

89- 1547

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Supreme Court, U.S.

FILED

MAR 4 1990

JOSEPH F. SPANIOLO, JR.
CLERK

MICHAEL A. SALMINEN,

PETITIONER,

vs.

MARTHA TERRY, AS SPECIAL ADMINIS-
TRATRIX OF THE ESTATE OF EMANUEL H.
STEIN, DECEASED; and FIRST BANK
NATIONAL ASSOCIATION OF DULUTH,
d/b/a FIRST BANK DULUTH, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
EMANUEL H. STEIN, DECEASED,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE MINNESOTA COURT OF APPEALS

MICHAEL A. SALMINEN
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PETITIONER pro se



QUESTIONS PRESENTED FOR REVIEW

Does the November 15, 1989 Minnesota Court of Appeals Order deny Petitioner his United States Constitutional rights, pursuant to Fourteenth Amendment, Section 1; and 42 United States Code § 1983?

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ATTORNEYS FOR RESPONDENTS MARTHA TERRY
AND FIRST BANK DULUTH

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15792, C84-0558, 85-0064HC,
87-10958, 88-11246 and
88-10429 D-5,8,G-46,55,56

No. _____

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TRATRIX OF THE ESTATE OF EMANUEL H.
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NATIONAL ASSOCIATION OF DULUTH,
d/b/a FIRST BANK DULUTH, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
EMANUEL H. STEIN, DECEASED,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE MINNESOTA COURT OF APPEALS

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PETITIONER pro se

Pro se Petitioner, Michael A. Salminen, respectfully prays that a Writ of Certiorari, or in the alternative, other appropriate writ issue to review the Minnesota Court of Appeals Order dated November 14, and filed November 15, 1989. (Appendix A)

OPINIONS BELOW

Minnesota Court of Appeals Order entered November 15, 1989. (Appendix A)

Minnesota Supreme Court Order entered January 8, 1990. (Appendix B)

District Court Order entered September 26, 1989. (Appendix C)

Judgment of Dismissal entered June 1, 1989. (Appendix F)

Order, Order For Judgment, and Memorandum filed June 1, 1989. (Appendix E)

JURISDICTION

The Minnesota Supreme Court Order entered January 8, 1990, exhausts State Court remedies. The jurisdiction of the United States Supreme Court is invoked

under the Fourteenth Amendment, Section 1, United States Constitution, and 42 USC § 1983.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, 14th Amendment, Section 1:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law"

STATEMENT OF THE CASE

The instant matter originates from legal action "Merchants and Miners State Bank vs. Spal Enterprise, et al," file #C84-0558, and "In Re the Petition of Richard F. Spearman, Petitioner, for Dissolution of partnership of: Spal Enterprise, a Minnesota Partnership," file #85-0064HC. The instant matter is a suit against the personal representatives of the Estate of attorney Emanuel H. Stein, pursuant to Minnesota Statutes 524.3-703.

The trial court denied Plaintiff's

motion to consolidate the trials. (Pg G-52 through G-57)(E-1 through E-6) Trial Court's Order, Order For Judgment, and Memorandum also granted Defendants summary judgment and dismissed the action with prejudice. The document is unsigned, and lacks Findings of Fact and Conclusions of law. On the same date, the Court Administrator issued Judgment of Dismissal without a motion before the Court. (Appendix F) MISTAKE BY THE COURT.

Within the requirements of Rule 60.02, Minnesota Rules of Civil Procedure, Plaintiff timely moved the Court to relieve him from the Judgment of Dismissal and Order for Summary Judgment, further requesting a new trial with a jury to hear the facts. (pg G-1 through G-16) Trial Court denied the motion, and Plaintiff appealed that Order. (Appendix C, Pg C-1 through C-3) Defendants moved the Minnesota Court of Appeals for

Dismissal of Appeal. Court of Appeals dismissed the appeal. (Appendix A) Appellant petitioned the Minnesota Supreme Court to Review Decision Of Court Of Appeals. That State Court of last resort denied the petition for review, entering its Order on January 8, 1990. (Appendix B)

Petitioner relies in part upon the contents of his Appellant's Memorandum of Law In Opposition To Motion To Dismiss Appeal (Appendix D, Pg D-1 through D-14), and his Notice Of Motion And Motion w/Memorandum/Exhibits A,B,C,D,E & F (Appendix G, Pg G-1 through G-57) in support as reasons for the U.S Supreme Court to grant him an appropriate writ. No other adequate, plain and speedy remedy exists in the prejudicial Minnesota State Courts.

WHEN FEDERAL ISSUE WAS RAISED

Included and explained in "Method Of Raising The Federal Question" as follows:

METHOD OF RAISING THE FEDERAL QUESTION

Petitioner's April 9, 1986 letter to Judge Joseph R. Scherkenbach stated:

"This citizen of the State of Minnesota and the United States of America has been denied due process in the courts of Judges Dubow and Scherkenbach." (Appendix G, Pg G-47)

Petitioner's May 9, 1989 Memorandum Of Law in support of his Motion for "Consolidation of Trials" states:

"Under law of the United States, undersigned has been deprived of his property without due process." (14th Amend. U.S. Const:)(St. Louis I.M. & S.R. Co. v Taylor (1908) 28 S Ct 616)(Philip Wagner, Inc. v Leser (1915) 36 S Ct 66)(Buchanan v Warley (1917) 38 S Ct 16)(Perry v Sinderman (1972) 92 S Ct 2694)(Lott v Haley (1979) La 370 So 2d 521)(Burrows v Keene (1981) 432 A 2d 15)(Crumpton v Mitchell (1981) 281 SE 2d 574)(State ex rel. Spurck v Civil Service Board et al, 32 N.W. 2d 574) (Appendix G, Pg G-56)

Petitioner's September 8, 1989 Memorandum Of Law in support of his Motion for Relief from Judgment of Dismissal states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Article XIV, Section 1, Constitution of the United States of America)
(Appendix G, Pg G-14,15 & 16)

Petitioner's November 7, 1989 Memorandum Of Law In Opposition To Motion To Dismiss Appeal, states:

"Appellant states that the Courts of the State of Minnesota have deprived him of his property and rights without due process of law in the instant matter and related cases of origination, being 15792, C84-0558, 85-0064HC, 87-10958, 88-11246, 88-10429. He assertively objects to any denial of his rights by Minnesota Courts that he would have had under United States law. He states that he has been deprived of his due process rights under the Minnesota Constitution, Article 1, Sections 2,4,7 and 8."
(Appendix D, Pg D-9 & D-10)

REASONS FOR GRANTING WRIT

Attorney Stein's letter to Petitioner is a fraudulent misrepresentation. (Appendix G, Pg G-51) Depositions taken of Stanley A. Dow prove Stein was deeply involved as a conspirator in the fraudulent

scheme perpetrated upon Plaintiff. (Appendix G, Pg G-17 thru G-36)(G-37 thru G-44)

Judges Joseph R. Scherkenbach and David E. Ackerson consistently thwarted Plaintiff's attempt to make discovery to fairly present his cases, deprived him of his right to have the facts tried by juries, and unlawfully dismissed this matter and related actions of origination without Findings of Facts and Conclusions of Law. Judge Ackerson wrongfully denied Plaintiff's motion for relief from the unlawful judgment of dismissal in this matter. Minnesota Court of Appeals erred when it upheld Judge Ackerson's Order. This constitutes MISTAKE BY THE COURTS. (Appendix C, E & F)(Appendix G, Pg G-15 & G-16)

District Court Judges Scherkenbach and Ackerson, plus the Honorable Judges on the Minnesota Court of Appeals, and Minnesota Supreme Court Justice, Peter S.

Popovich, with overwhelming prejudice and nonfeasance, did not address the Federal Fourteenth Amendment issue raised by Plaintiff/Petitioner. This group of Minnesota Judges, operating under judicial function, render politically motivated decisions that are unlawful. (Pg D-12, 13)

Petitioner is a citizen of the United States. Pursuant to Federal Rule 17(c), Jurisdiction on Writ of Certiorari, the Minnesota Trial and Appellate Courts decided a Federal question in a way in conflict with applicable decisions of the United States Supreme Court.

For special and important reasons presented herein, Petitioner respectfully requests allowance of Writ of Certiorari, or in the alternative, other appropriate writ to review Minnesota Court of Appeals Order entered November 15, 1989.

(Appendix A)

Dated: March 26, 1990.

Respectfully Submitted,

Michael A. Salminen

MICHAEL A. SALMINEN

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(218) 263-6477

Petitioner pro se

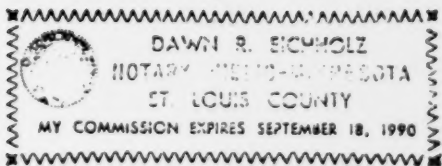
STATE OF MINNESOTA)
) ss
COUNTY OF ST. LOUIS)

MICHAEL A. SALMINEN, first being sworn upon an oath, states that this petition for writ of certiorari is made in good faith, is not frivolous, and is not interposed for the purpose of delay; and that the facts stated in the foregoing petition, so far as they come within his own knowledge, are true, and so far as derived from the knowledge of others, he believes them to be true.,

Michael A. Salminen
MICHAEL A. SALMINEN

Subscribed and sworn to
before me on this 19th
day of March, 1990.

David R. Eickholz
Notary Public



STATE OF MINNESOTA
IN COURT OF APPEALS

MICHAEL A. SALMINEN,

APPELLANT,

ORDER

vs.

C9-89-1921

MARTHA TERRY, AS SPECIAL
ADMINISTRATRIX OF THE ESTATE
OF EMANUEL H. STEIN, DECEASED,
et al.,

RESPONDENTS.

Considered and decided by Wozniak,
Chief J., Forsberg, J., and Norton, J.

BASED UPON THE FILE, RECORDS AND PRO-
CEEDINGS HEREIN, AND FOR THE FOLLOWING
REASONS:

Summary judgment adverse to the appel-
ant was entered on the merits of the un-
derlying action on June 1, 1989. No ap-
peal was taken from that judgment. Sal-
minen now seeks review of a September 26,
1989 order denying his motion to vacate
the judgment.

Appendix A

A party may not revive the right to appeal from the judgment by moving to vacate after the time for appeal has expired.

LeRoy v. Figure Skating Club of Minneapolis, 281 Minn. 576, 162 N.W. 2d 248

(1968). An order denying a motion to vacate which was based on grounds reviewable by appeal from the judgment is nonappealable. LaFond v. Szczepanski, 273 Minn. 293, 296, 141 N.W. 2d 485, 487 (1956).

The grounds raised in Salminen's motion to vacate were reviewable by appeal from the judgment, and Salminen's failure to appeal in a timely manner from the judgment bars this appeal from the order denying the motion to vacate.

IT IS HEREBY ORDERED this appeal is dismissed.

Dated: November 14, 1989.

BY THE COURT

D.D. Wozniak
Chief Judge

CLL/cjs

STATE OF MINNESOTA

IN SUPREME COURT

C9-89-1921

Michael A. Salminen,

Appellant,

vs.

Martha Terry, as Special
Administratrix of the Estate
of Emanuel H. Stein, Deceased;
et al., etc.,

Respondents.

ORDER

Based upon all the files, records
and proceedings herein,

IT IS HEREBY ORDERED that the peti-
tion of Michael A. Salminen for further
review be, and the same is, denied.

Dated: 1-8-90

BY THE COURT

Peter S. Popovich
Chief Justice

Appendix B

STATE OF MINNESOTA
COUNTY OF ST. LOUIS

DISTRICT COURT
DIVISION 1
SIXTH JUD. DISTRICT

MICHAEL A. SALMINEN,
Plaintiff,

Court file No.
88-10364

vs

ORDER

MARTHA TERRY, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and FIRST BANK
NATIONAL ASSOCIATION OF
DULUTH, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

The above-entitled matter came on for
hearing before the undersigned Judge of
District Court on the 21st day of Septem-
ber, 1989, at the St. Louis County Court-
house, Hibbing, Minnesota, Eric D. Hylden,
700 Providence Building, Duluth, Minnesota,
appeared on behalf of Defendants Martha
Terry, et al. Michael A. Salminen appear-
ed pro se.

Based upon all the files, records and
Appendix C

proceedings herein, having heard the arguments of counsel and being fully advised in the premises, the Court hereby makes the following:

ORDER

1. Plaintiff's motion for relief from judgment and for a new trial is denied, it appearing that Plaintiff was not timely made under Minnesota Rule of Civil Procedure 50 and/or 59, it further appearing that Plaintiff has not timely appealed from the Judgment entered on June 1, 1989, under Minnesota Rule of Civil Appellate Procedure 104.01, and it further appearing that no grounds for vacating said judgment under Minnesota Rule of Civil Procedure 60.02 exist.

2. The motion of Defendants for attorney's fees incurred as the result of defending this motion is denied.

Dated this 26th day of September, 1989.

BY THE COURT:

DAVID E. ACKERSON
Judge of District Court

STATE OF MINNESOTA
IN COURT OF APPEALS

MICHAEL A. SALMINEN,

Appellant.

vs.

MARTHA TERRY, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and FIRST BANK
NATIONAL ASSOCIATION OF
DULUTH, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Respondents.

APPELLANT'S
MEMORANDUM OF
LAW IN OPPOS-
ITION TO MO-
TION TO DIS-
MISS APPEAL

Appellate
Case Number:

C9-89-1921

TO: MARTHA TERRY and FIRST BANK DULUTH,
Defendants, and STEVEN W. SCHNEIDER,
their attorney.

Appellant commenced the above-entitled
legal action on the 19th day of April,
1988. The following papers were served
with, and as a part of, the Summons and
Complaint:

8/25/85 & 8/27/85 typewritten repro-
ductions of taped conversations between
Spal Enterprise partner, Michael A. Sal-
minen, and Stanley A. Dow;

9/24/85 Transcript of deposition taken
of Richard F. Spearman;

Appendix D

3/11/86 Transcript of deposition taken of Stanley A. Dow;

6/30/86 Transcript of deposition taken of Stanley A. Dow;

7/16/86 letter from attorney Manuel H. Stein to M. Salminen;

4/9/88 letter from M. Salminen to Judge Scherkenbach w/attached 3/12/86 letter from M. Salminen to Judge Scherkenbach.

All of the above will be sent down on the appeal, by the trial court. The Court of Appeals is adjudicating only the September 26, 1988 trial court Order, relative to Appellant's trial court motion requesting relief from judgment and request for new trial to be heard by a jury. Trial court motion enclosed as Exh. A, plus the following:

Partial transcript of Dow's March 11, 1986 deposition (Exh B);

Partial transcript of Dow's June 30, 1986 deposition (Exh C);

M. Salminen's April 9, 1988 & March 12, 1986 letters to Judge Scherkenbach (Exh D);

Attorney Stein's July 16, 1986 letter to M. Salminen (Exh E)

"Consolidation of Trials" motion (Exh F)
Appellant has filed copies of pertinent

papers from the file in the instant matter with the Probate Court in regard the matter of the Estate of Emanuel H. Stein, files #10967 & 10967A. The instant matter and District Court legal actions of origination are closely intertwined. They are:

"Richard F. Spearman vs. Audrey Lor-Lorraine Salminen & Michael A. Salminen", #15792;

"In Re the Dissolution of Spal Enterprise, a Minnesota Partnership", #85-0064HC;

"Merchants & Miners State Bank vs. Spal Enterprise, et al", #C84-0558;

"Arrowhead Ventures, Inc. vs. Michael A. Salminen", #87-10958;

"Salminen vs. Public Utilities Commission", #88-10429;

"Spal Partnership vs. City of Hibbing, et al", #88-11246.

Appellant has alleged conspiracy, fraud upon the court, fraud by the court, obstruction of justice, miscarriage of justice, deceit and collusion by officers of the court and parties to the actions. With overwhelming bias and prejudice,

District Court Judges Dubow, Ackerson and Scherkenbach have wrongfully denied Appellant his right to have the facts tried by a jury in the above-referenced legal actions.

Emanuel H. Stein represented Stanley A. Dow, giving him legal advice in regard Dow's representation of Open Arms Corporation and Minneapolis investors relative to a concealed offer for Spal Enterprise property made only to Spal partner Richard F. Spearman and his wife Sally Spearman in 1983. The Spearmans, Dow and Merchants and Miners State Bank personnel knowingly, willfully and maliciously concealed the \$950,000.00 offer from partner Salminen, Appellant. The M & M Bank loan to the partnership was not in default in 1983. Had Appellant Salminen been informed of the offer, the property could have been sold, and Salminen would have had a profit in excess of \$400,000.00. Salminen has

been swindled, and attorney Stein was a conspirator that had joined the fraudulent scheme. The foreclosure by action suit, #C84-0558, would not have ensued, nor would legal actions 85-0064HC, 88-11246, 87-10958, 88-10429, 15792 and the instant matter have been brought. Review of Dow's March 11, 1986 deposition transcript reveals repeatedly that Stein was Dow's legal counsel in regard concealments from partner Salminen. (Page 10, Lines 8-15; P 11, L 24-25; P 12, L 16-25; P 17, L 17-18; P 24, L 17-21; P 27, L 10-12 & 22-24; P 36, L 15-18; P 37, L 15-19; P 43, L 21-25; P 56, L 7-8 & 18-19; P 71, L 12-20. (Exh B) Throughout the taking of the deposition, Spearman's attorney, Richard E. Prebich, and Audrey Lorraine Salminen's attorney, Jack Fena, acted in legal misconduct, deceit and collusion when they knowingly, willfully and maliciously gave legal advice to Stanley A. Dow, client of Emanuel H. Stein.

Dow willfully gave Appellant tape recorded statements on the 25th and 27th days of August, 1985, stating that there was a \$950,000.00 offer made to Spal Enterprise partner Richard F. Spearman and his wife Sally in both 1983 and 1985; that partner Spearman told Dow that the partnership property was not available in 1983; that Merchants and Miners State Bank personnel were made aware of the offer in 1983; that First National Bank of Minneapolis and Minneapolis investors were involved; that Dow represented Open Arms Corporation in both the 1983 and 1985 offers; and that the first time that Appellant had met or spoken to Dow was March 29, 1985. M & M Bank attorney, David T. Stall, took Dow's deposition on 6/30/86 in the case - "Group Health Association of Northeastern Minnesota, Inc. vs. Stanley Dow". (Exh C) Attorney Stall questioned Dow in regard attorney Stein's role as Dow's attorney,

relative to Dow's attempt to purchase the Spal Enterprise partnership property. (Old Hibbing General Hospital) Dow refers to Stein as his attorney on page 16, lines 5-17, pg 18, L 14-25 and pg 19, L 13-24.

Dow made a misrepresentation when he said that his attorney, Stein, talked to partner Salminen on page 18, lines 14-25. The truth is that Stein fraudulently concealed his involvement with Dow from Salminen.

(Exh E) Dow stated that his attorney, Stein, told him that the Bank would hold off on the foreclosure with a feasible sale going through. Partner Salminen was never informed by the Merchants and Miners State Bank personnel or attorney Stein of the concealed offer. Legal action C84-0558, Merchants and Miners State Bank vs. Spal Enterprise, et al, a foreclosure by action, was commenced by the Bank, the summons being filed with the trial court on August 13, 1984, and the Complaint being filed on

the 2nd of October, 1984.

Pursuant to Minnesota Rules of Civil Procedure, Rule 38.01, Appellant was wrongfully denied his right to have the facts tried by a jury in legal actions C84-0558, 85-0064HC, 87-10958, and 88-11246. He is wrongfully being denied the right in the instant matter, as a result of Defendant's motion to dismiss the appeal. Appellant had earlier moved the trial court for "consolidation of trials" of all of the above-referenced legal actions. (Exh F) The trial court denied the motion.

The evidence before the Court is "clear, unequivocal and convincing" that attorney Emanuel H. Stein was one who joined the conspiracy that perpetrated a fraudulent scheme upon Appellant, causing his financial destruction and overwhelming mental anguish. Stein's craftily worded artifice of July 16, 1986, deceived Appellant as

to the true significant role that Stein played in the conspiracy. (Exh E)

"The proper method to obtain relief from a prior judgment was by motion and not by equitable action" (Phelps v Western Realty Co. (1903) 94 N.W. 1085)

"The question of fraud is for the jury" (Venier v Forbes (1946) 25 N.W. 2d 704)

"The trial court is the trier of fact on the issue of fraud, not the supreme court" (Witzig v Philipps (1966) 144 N.W. 2d 266)

"Whether a party was justified in relying upon the representations is ordinarily a question for the jury" (Placke v White-Price Co. (1930) 228 N.W. 554)

"It is for jury, not for court, to determine weight to be given testimony and to decide what testimony proves" (Penteluk v Stark (1955) 69 N.W. 2d 899)

"If any doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists" (Sauter v Sauter (1955) 70 N.W. 2d 351)

Rule 38.01, Minnesota Rules of Civil Procedure - In actions for the recovery of money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered.

Appellant states that the Courts of the State of Minnesota have deprived him of

his property and rights without due process of law in the instant matter and related cases of origination, being 15792, C84-0558, 85-0064HC, 87-10958, 88-11246, 88-10429. He assertively objects to any denial of his rights by Minnesota Courts that he would have had under United States law. He states that he has been deprived of his due process rights under the Minnesota Constitution, Article 1, Sections 2, 4, 7 and 8.

"Constitutional right or entitlement may be of 2 origins; it may arise directly from text of constitution as interpreted by courts, or it may arise out of substantive laws and regulations of states and be protected by due process clause of Fourteenth Amendment" (Washington v Starke (1986 WD Mich) 626 F Supp 1149)

"Constitutional protection against deprivation of property without due process of law is available to persons arbitrarily

deprived of their private rights by state action whether under guise of legislative authority or otherwise" (Philip Wagner, Inc. v Leser (1915) 36 S Ct 66)

"Phrase "color of state law" whether used in context of 42 USC § 1983 or in context of its criminal counterpart, 18 USC 242, is synonymous with concept of "state action" under Fourteenth Amendment" (Timson v Weiner (1975 DC Ohio) 395 F Supp 1344)

"Private defendant acts under color of state law for purposes of 1983 when he is willful participant in joint action with state or its agents" (Malak v Associated Physicians, Inc. (1986 CA Ind.) 784 F 2d 277)

The arbitrary and capricious acts and behaviour of District Court Judges Joseph R. Scherkenbach and David E. Ackerson in the instant matter constitute overwhelming prejudice and bias. Even though the

Judges on the Court of Appeals are politically appointed by Governor Rudolph G. Perpich; even though Appeals Judge James Randall is a significant shareholder in the Merchants and Miners State Bank of Hibbing; even though the Court of Appeals, in nonfeasance through neglect or failure, does not adjudicate Appellant's issues presented to it in other legal actions; even though the Minnesota Supreme Court consistently denies Appellant's Petitions For Review submitted in related cases of origin, the undersigned Appellant requests the Honorable Judges of the Court of Appeals, in regard the instant matter, render a decision that is not based upon political expediency to protect Governor Perpich, Jack DeLuca (Director/Shareholder in M&M State Bank), Court of Appeals Judge James Randall (significant Shareholder in M&M State Bank), Judge David E. Ackerson (whose wife is an employee at M&M State Bank),

James V. Abate (Shareholder in M&M State Bank and attorney for Richard F. Spearman), Richard E. Prebich (attorney for Ann Stein in re the Estate of Emanuel H. Stein, and attorney for Richard F. Spearman), all of the Directors on the Board at M&M State Bank, Richard and Sally Spearman (Shareholders in M&M State Bank), Defendants Martha Terry and First Bank Duluth as personal representatives of the Estate of Emanuel H. Stein (Mr. Stein and Martha Terry as Shareholders in the M&M State Bank), and others as parties and attorneys who have appeared or filed papers in the foregoing legal actions noted above.

CONCLUSION

It is obvious to anyone with the most rudimentary grasp of the situation that a substantial failure of justice has occurred in the instant matter. The evidence is clear and convincing that Appellant's fact issues have not been addressed in

the trial court. His allegations of fraud are for the jury to decide.

For all of the reasons shown in the memorandum herein, the Appellant, Michael A. Salminen, requests an Order from the Court as follows:

1. That denies Defendants motion to Dismiss Appeal.
2. Awards to Appellant his reasonable pro se fees, costs and disbursements, resulting from his need to respond to Defendants frivolous motion.

Dated this 7th day of November, 1989.

MICHAEL A. SALMINEN
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Hibbing, Minnesota 55746
(218) 263-6477
Appellant pro se

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ST. LOUIS SIXTH JUD, DISTRICT

Michael A. Salminen,

Plaintiff,

File No.
88-10364

vs.

Martha Terry, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and First Bank
National Association of
Duluth, d/b/a First Bank
Duluth, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

ORDER, ORDER
FOR JUDGMENT,
AND MEMORANDUM

Defendants.

DATE OF HEARING: May 18, 1989
 Hibbing, Minnesota

APPEARANCES: Michael A. Salminen, pro se

Steven W. Schneider for De-
fendants Martha Terry and
First Bank Duluth

Richard Prebich for Richard
F. Spearman

The above-entitled matter came on for
hearing before the undersigned on May 18,
1989 upon the Motion of Defendants for
Appendix E

Summary Judgment and the Motion of Plaintiff for Consolidation of Trials.

Having heard the arguments presented and having reviewed the submitted memorandum, the Court hereby makes the following

ORDER AND ORDER FOR JUDGMENT

It is ORDERED, that Defendants' Motion for Summary Judgment is granted and that Plaintiff's Motion for Consolidation of Trials is denied.

It is further ORDERED, that the above-entitled action is dismissed with prejudice against the Plaintiff and upon the merits but without further costs to any party.

The attached Memorandum is made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 1, 1989.

BY THE COURT

JOSEPH R. SCHERKENBACH
Judge of the District Court

MEMORANDUM

Motion for Summary Judgment

Defendants base this Motion on the assertion that Plaintiff has failed to set forth facts which would satisfy the elements of either of his claims, namely fraud and conspiracy. Plaintiff responded to Defendants' challenge of the fraud claim in oral argument by stating that Emanuel Stein, the attorney for a prospective purchaser of SPAL partnership property, had a legal duty to advise both partners of an offer for purchase of that property.

The Court finds that since Mr. Stein was not representing either the SPAL partnership or the Plaintiff or the Plaintiff's partner, he could not possibly have had a duty of disclosure to the Plaintiff. Thus Plaintiff has not established a claim of fraud based on a breach of such duty. Furthermore, Plaintiff has made no

allegations to the effect that Mr. Stein made any sort of affirmative misrepresentation. Having failed to sufficiently allege either one of these most basic elements of fraud, Plaintiff's claim cannot withstand this Motion for Summary Judgment. See e.g. *Western Contracting Corp. v Dow Chemical Co.*, 664 F 2d 1097; *McGinn v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 736 F 2d 1254; *Kost v Peterson*, 193 N.W. 2d 291, 292 (Minn. 1971)

With regard to the conspiracy claim, the Court recognizes that it could be an unlawful act for one partner to fail to disclose an offer for purchase of partnership property to the other partner. However, to support an allegation of conspiracy against Mr. Stein, Plaintiff would have to show that Mr. Stein agreed with Plaintiff's partner to act in furtherance of this unlawful purpose. See *Bukowski v Juranek*, 35 N.W. 2d 427

(Minn. 1949). Plaintiff has presented only a bare assertion of conspiracy. He has made no specific allegation of any relation at all between Mr. Stein and his partner--only the attorney-- client relation between Mr. Stein and the prospective purchaser, Mr. Dow. Thus, this claim also cannot be sustained.

In opposing this Motion for Summary Judgment, Plaintiff cannot rest merely on the allegations contained within his pleadings. He must present specific facts showing genuine issues for trial. Minn. R. Civ. P. 56.05; *Marose v Hennameyer*, 347 N.W. 2d 509, 511 (Minn. App. 1984). Since Plaintiff has not presented any legally sufficient fact to support his claims of fraud and/or conspiracy, Defendants' Motion for Summary Judgment shall be granted.

MOTION FOR CONSOLIDATION OF TRIALS

Having determined that this action is

appropriate for Summary Judgment, the Court finds that Plaintiff's Motion for Consolidation is moot.

J.R.S.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT

Michael A. Salminen,

Plaintiff,

vs.

JUDGMENT OF
DISMISSAL

File 88-10364

Martha Terry, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and First Bank
National Association of
Duluth, d/b/a First Bank
Duluth, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

The Court having granted Summary Judg-
ment on behalf of all of the defen-
dants, Now, Therefore, Pursuant to
said Order Granting Summary Judgment,
IT IS HEREBY ADJUDGED, DETERMINED AND
DECREED:

That the above-entitled action is here-
by dismissed with prejudice.

Dated this 1st day of June, 1989

BY THE COURT

JOSEPH M. LASKY, COURT ADMINISTRATOR

By Teresa Fredrickson
Deputy

Appendix F

STATE OF MINNESOTA DIST. COURT-CIV. DIV.
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT

MICHAEL A. SALMINEN,

Plaintiff,

vs.

NOTICE OF MO-
TION AND MO-
TION

Court file
88-10364

MARTHA TERRY, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and FIRST BANK
NATIONAL ASSOCIATION OF
DULUTH, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

TO: MARTHA TERRY and FIRST BANK DULUTH,
Defendants, and STEVEN W. SCHNEIDER,
their attorney.

PLEASE TAKE NOTICE that the Plaintiff
will move the above-named Court at the St.
Louis County Courthouse in Hibbing, Minn-
esota, on the 21st day of September, 1989,
at 8:30 a.m. or as soon thereafter as coun-
sel can be heard, for an Order that:

1. Relieves Plaintiff from the trial
court's Judgment of Dismissal and Order

Exh A
Appendix G

for Summary Judgment entered June 1, 1989,
and

2. Orders a new trial with a jury to hear the facts.

3. Award Plaintiff his pro se fees, costs and disbursements. This motion is made pursuant to Rule 60.02, Minnesota Rules of Civil Procedure, and is based upon the Memorandum attached, the files, records and proceedings herein, plus the transcripts of depositions attached to the Complaint that commenced the action.

Pursuant to Special Term Rule 2.1, Plaintiff states that Defendant's responsive brief, if any, must be served and filed at least two full days before said motion is heard.

Plaintiff hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to M.S.A. Section 549.21, subd. 2, to the party against whom the allegations

in this pleading are asserted.

Dated this 8th day of September, 1989.

MICHAEL A. SALMINEN
P.O. Box 353
Hibbing, Minnesota 55746
(218) 263-6477

STATE OF MINNESOTA DIST. COURT- CIV DIV
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT

Michael A. Salminen,

Plaintiff,

vs.

Martha Terry, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and FIRST BANK
NATIONAL ASSOCIATION OF
DULUTH, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

MEMORANDUM
OF LAW

Court file
88-10364

The Honorable Joseph R. Scherkenbach,
by and through his mistakes and errors,
wrongfully granted summary judgment to the
defendants and wrongfully dismissed the in-
stant action with prejudice. Plaintiff's
motion attached moves the court for an Or-
der that relieves him from the Judgment of
Dismissal, and further orders a new trial
before a jury to hear the facts, pursuant
to Rule 60.02 (a)(f), Minnesota Rules of

Civil Procedure. Plaintiff's claim is meritorious, based upon genuine fact issues contained in his pleadings, depositions, opposing brief and supplemental papers attached to his Complaint, on file in the instant matter. (Bentonize, Inc. v Green (Minn. Ct. of App. 1988) 431 N.W. 2d 579)

In clear and convincing fashion, Plaintiff's papers show:

- (a) He has a reasonable claim on the merits;
- (b) He has not failed or neglected to act;
- (c) He has acted within the statutory period after entry of Judgment;
- (d) No substantial prejudice will result to opponents.

The provision authorizing court to modify or set aside its judgment for good cause shown applies to all judgments and not simply to default judgments or judgments that were erroneous. (Holmes v Conter (1941) 295 N.W. 649)

Erroneous judgment or one founded on some irregularity is voidable. (Lange v Johnson (1973) 204 N.W. 2d 205)

The proper method to obtain relief from a prior judgment was by motion and not by equitable action. (Phelps v Western Realty Co. (1903) 94 N.W. 1085)

It is for jury, not for court, to determine weight to be given testimony and to decide what testimony proves. (Penteluk v Stark (1955) 69 N.W. 2d 899)

Nature and character of controversy is determined from all of pleadings and that determination governs right to jury trial. (Olson v Aretz (App 1984) 346 N.W. 2d 178)

Whether a party was justified in relying upon the representations is ordinarily a question for the jury. (Placke v White-Price Co. (1930) 228 N.W. 554)

The question of fraud is for the jury. (Venier v Forbes (1946) 25 N.W. 2d 704)

The trial court is the trier of fact

on the issue of fraud, not the supreme court. (Witzig v Philipps (1966) 144 N.W. 2d 266)

If any doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. (Sauter v Sauter (1955) 70 N.W. 2d 351)

The court must view the evidence in the light most favorable to the nonmoving party. (White v Johnson (1965) 137 N.W. 2d 674)

Nonmoving party does not need to produce clear and convincing evidence to defeat summary judgment motion; moving party has burden of showing absence of factual issues before summary judgment can be granted and nonmoving party must only show that there are specific facts in existence which create genuine issue for trial; nonmoving party has the benefit of the view of the evidence most favorable to him. (Lund-

gren v Eustermann (Minn. Ct. of App 1984)
356 N.W. 2d 762)

A material fact that will preclude issuance of a summary judgment is one that will affect the result or outcome of the case depending on its resolution. (Rathbun v W.T. Grant Co. (1974) 219 N.W. 2d 641)

Summary judgment was unjustified where prevailing party did not show entitlement to judgment as matter of law. (Asmus v Ourada (Minn. Ct. of App 1987) 470 N.W. 2d 432)

Where there are genuine issues of material fact that were unresolved, disposition by summary judgment was inappropriate. (Betlach v Wayzata Condominium (1979) 281 N.W. 2d 328)

Summary judgment was proper only where there was no genuine issue of material fact in dispute and where determination of applicable law would resolve controversy.

(Gaspord v Washington County Planning Comm.
(1977) 252 N.W. 2d 590)

Summary judgment is inappropriate where there is a question of fact about the falsity of the representations. (Agristor Leasing v Guggisberg (D Minn. 1985) 617 F Supp 902)

A motion for summary judgment may not be used to resolve issues of fact. The purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. (Sprague v Vogt (8th Cir. 1945) 150 F 2d 795)

Where fact issue was present, summary judgment could not be granted, and issue had to be finally disposed of at trial. (O'Connor v City of Minneapolis (D Minn. 1960) 182 F Supp 494)

A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented. (Anderson v Twin City Rapid

Transit Co. (1957) 84 N.W. 2d 593)

Summary judgment based on pleadings alleging fraud or misrepresentation in a transaction approved by the probate court is proper where there is no genuine issue of fact. However, where questions of fact do exist about the plaintiff's reliance on a defendant's misrepresentation, a summary judgment is inappropriate. (City of Coon Rapids v Suburban Engr's, Inc. (1969) 167 N.W. 2d 493)

In order to permit summary judgment under Rule 56.03 of Minnesota Rules of Civil Procedure, pleadings, depositions and admissions on file, together with affidavits, had to show that there was no genuine issue as to any material fact and that moving party was entitled to judgment as matter of law. (Abdullah, Inc. v Martin (1954) 65 N.W. 2d 641)

Summary judgment is a "Blunt Instrument" and should not be employed to determine

issues that suggest that questions be answered before the rights of the parties can be fairly passed on. (Donnay v Boulware (1966) 144 N.W. 2d 711) (Republic National Life Ins. Co. v Lorraine Realty Corp. (1979) 279 N.W. 2d 349) (Granell v VFW Milton Barber Post No. 3871 (Minn. Ct of App 1984) 357 N.W. 2d 431)

An involuntary dismissal cannot be made ex-parte. Minnesota Rule 41.02(1) requires notice for a hearing on the motion.

A court may order an involuntary dismissal under Minnesota Rule 41.02(2) when the plaintiff is unable to establish facts sufficient to entitle the plaintiff to relief. Such dismissals must be made at defendant's motion and can be made only after the plaintiff rested his case. (Gittleman v Fasenmaier (1964) 128 N.W. 2d 709)

The standards utilized in determining the propriety of dismissing a complaint on the ground that the plaintiff has shown

no right to relief; it must be determined whether, as a matter of law, the evidence is sufficient to present a fact question for the jury's consideration, and in making such decision, the court must view the credibility of the evidence and every inference which may reasonably be drawn therefrom in favor of the adverse party. (Paradise v City of Minneapolis (Minn. 1980) 297 N.W. 2d 152 (under rule authorizing dismissal of case if plaintiff fails to establish cause of action and in exercising such authority in jury trial, court must give plaintiff benefit of every reasonable inference that might be drawn from evidence)

While dismissal is proper if pleadings, depositions and admissions on file together with affidavits show that moving party is entitled to judgment as matter of law, all doubts and factual inferences must be resolved against movant and in favor of

party opposing motion. (City of Shakopee v Koop & Assoc., Inc. (1968) 159 N.W. 2d 901)

Under Minnesota Rules of Civil Procedure 41.02(2), the court is authorized to grant a dismissal only after the plaintiff has completed the presentation of his case, and it is error to grant a motion to dismiss before the plaintiff has rested. (Gittleman v Fesenmaier (1964) 128 N.W. 2d 709) (State Board of Medical Examiners v Olson (1973) 206 N.W. 2d 12)

If the court grants a judgment of dismissal on the merits of a court-tried action under rule 41.02, findings of fact and conclusions of law must be made and entered as required under rule 52.01. (State v Bollenbach (1954) 63 N.W. 2d 278) (Ketterer v Ind. School Dist. No. 1 (1956) 79 N.W. 2d 428)

Pro se complaints are to be liberally construed and not dismissed unless the plaintiff presents no set of facts under

which relief might be granted. (Conley v Gibson 355 U.S. 41 45-6 (1957))

In actions for the recovery of money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered. (Rule 38.01, Minnesota Rules of Civil Procedure)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Article XIV, Section 1, Constitution of the United States of America)

Constitutional protection against deprivation of property without due process of law is available to persons arbitrarily deprived of their private rights by state action whether under guise of legislative authority or otherwise. (Philip Wagner, Inc. v Leser (1915) 36 S Ct 66)

Supreme Court has jurisdiction where party in state court has claimed right or immunity under law of United States and it has been denied to him. (St. Louis I.M. & S.R. Co. v Taylor (1908) 28 S Ct 616)

Plaintiff does claim that the Courts in the State of Minnesota have deprived him of his property without due process of law, in the instant matter and in related cases of origination, #15792, C84-0558, 85-0064HC, 87-10958, 88-11246 and 88-10429. Pro se Plaintiff herein assertively objects to any denial of his rights by Minnesota Courts that he would have had under

United States law. There is mistake by the court because Plaintiff's pleadings, depositions and papers on file in the instant matter clearly show that there were genuine issues as to material fact. Therefore, Defendants were not entitled to a judgment as a matter of law. (Warner v First National Bank (8th Cir. 1955) 236 F 2d 853)

The court wrongfully granted Defendants summary judgment and dismissed the action without a motion for dismissal, thereby denying Plaintiff his right to have his facts heard by a jury. Therefore, Plaintiff had not yet rested his case. MISTAKE BY THE COURT.

If justice is to be served, Plaintiff's Motion for Order must be granted, forthwith.

Dated this 8th day of September, 1989

MICHAEL A. SAIMINEN
P.O. Box 353
Hibbing, Minnesota 55746
(218) 263-6477

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT
(PARTIAL)

-----)
In Re the Petition of Richard)
F. Spearman, Petitioner, for)
Dissolution of Partnership of:)
SPAL Enterprise, a Minnesota)
Partnership)
-----)

DEPOSITION OF STANLEY A. DOW, SR.

Deposition of Stanley A. Dow, Sr., taken pursuant to Notice, in the Court House in the City of Hibbing, County of St. Louis, State of Minnesota, on the 11th day of March, 1986, commencing at the hour of 1:30 p.m. of said date, before Dalton Braden, a notary public in and for the County of Itasca, State of Minnesota.

APPEARANCES:

On behalf of Petitioner Richard F. Spearman:

Mr. Richard E. Prebich
Abate, Wivoda, Clark & Prebich
Attorneys at Law
704 East Howard Street
P.O. Box 329
Hibbing, Minnesota 55746

Exh B

G-17

On behalf of Respondent Michael A. Salminen:

Mr. Michael A. Salminen, pro se
1920 10th Avenue East
Hibbing, Minnesota 55746

On behalf of Audrey Lorraine Salminen:

Mr. Jack Fena
Attorney at Law
311 East Howard Street
Hibbing, Minnesota 55746

(page 10)
anybody that a specific person was representing SPAL Enterprise in regard to the drafting of that purchase agreement?

Mr. Dow: No, I was not.

Mr. Salminen: Would you explain for us the type of corporation that Open Arms Corporation is, such as a tax status, number of directors, et cetera, and what statutes or what laws it was set up under, a Minnesota corporation, et cetera?

A. Under advice of my attorney I cannot answer questions regarding the corporation since they are not present.

Q. Since who is not present?

A. My attorney.

Q. Well, did you not receive notice of taking deposition?

A. I did receive notice. I also contacted my attorney. He'll be out of town until the 21st of this month because he's trying cases in Florida and he cannot be present.

Q. Why did you not advise the person who sent the notice of taking deposition then so suitable arrangements could be made so you could have your counsel here?

Mr. FENA: That's objected to as argumentative. He's your witness, counsel.

MR. PREBICH: The question is objected to on lack of relevancy and materiality to this case anyway. What type of corporation they may have in existence is not any of our concern.

(start page 11)

MR. SALMINEN: Well, Mr. Prebich, your law firm drew up the purchase agreement.

MR. PREBICH: I don't want you testifying on the record. This is my objection.

MR. SALMINEN: Okay. I'll refer to Rule 26.02 that says, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

MR. PREBICH: The question that you're asking will not lead to anything that would be admissable in trial in my opinion.

MR. SAIMINEN: That's your opinion.

MR. PREBICH: That's my opinion.

Q. (By Mr. Salminen) Is there an Open Arms Corporation registered in the State of Minnesota?

A. I will repeat myself again. I will not answer any questions concerning the corporation unless my attorney is present.

Q. Mr. Dow, did you state that you were representing the Open Arms Corporation in your attempt to purchase the Old Hibbing General Hospital property?

A. Yes, I did.

Q. What position did you have with that corporation?

A. I'm not at liberty to talk about any Board of Director members unless my attorney is present.

(start page 12)
Q. Well, I ask you why you did not

notify the person that sent the notice of taking deposition if you knew your attorney was not going to be available to represent you?

MR. FENA: Well, that's again objected to. And I would like to lay a foundation at this point.

Were you interviewed by Mr. Salminen before this deposition was taken?

THE WITNESS: I have talked to Mr. Salminen several times. He kept coming over to my house and talking to me and asking me questions.

MR. FENA: Did he ask you any of the facts that he's asking you about here at your interview?

THE WITNESS: Some of them were discussed and some of them were not.

MR. FENA: Did you answer his questions then?

THE WITNESS: Yes, I did, out of ignorance and not realizing that I should not

and was not at liberty to discuss them without my attorney being present.

MR. FENA: Well, in the interest again of not prolonging this and getting questions that you can't answer because of your attorney not being present, are you stating here that you're not going to answer questions similar to the ones Mr. Salminen is asking until you have an attorney present?

THE WITNESS: I will not answer any questions concerning the corporation of Open Arms unless my attorney is

(end of page 12)

(page 17)
Old Hibbing General Hospital property in regards to a proposed halfway house in your words, halfway house for rehabilitation of alcoholics?

MR. FENA: That's objected to as leading, suggestive, no foundation.

MR. PREBICH: Join.

Q. (by Mr. Salminen) Do you want to answer that?

A. I did not at any time talk to any bank officers about monies, financial situations, concerning anything to have to do with Open Arms, to have to do with Hibbing General, to have to do with a halfway house. That was not my function at the time that I was working on this.

Q. What was your function?

A. To oversee the project as it was taking place and developing here.

Q. Who were you hired by?

A. Again that's going into articles of incorporation which I cannot answer unless

my attorneys are here.

Q. You were then hired by a corporation you are saying?

A. I will restate it, I would not answer any questions concerning anything to do with a corporation.

Q. When you negotiated with Mr. Spearman relative to the offer that you said was made in 1985, was I included in any of those negotiations?

A. Could I have the question repeated, please, so I (end of page 17)

(page 24)

Q. (By Mr. Salminen) How do you answer that last question, Mr. Dow?

A. When I talked to Mr. Spearman there was no written offer offered on the building. It was a verbal offer - - or two verbal offers put forth. One was agreeable if both partners signed off, and one if we had to sit and negotiate and

haggle over the price. The less of the two was the one if we had to sit and haggle. All our people asked for was a speedy delivery of the building. We didn't care how fast the paperwork was signed, just how fast we could get possession of the building so we could start work on the building.

Q. Who do you mean by our people?

A. That again is leading into areas I cannot answer.

Q. Well, this is a deposition. We're talking about an offer that you made, and I'm asking you who do you consider your people?

A. Again that leads into areas that I cannot answer without my attorney being present.

Q. And again I'm going to ask you why didn't you advise the person that sent you the deposition that your attorney was not available at this time?

MR. FENA: Well, this is totally objected to. And I'm sure you're sincere, Mike, but you're not proceeding correctly. And I'm not going to sit here much longer and waste my client's money and my time. (end of page 24)

(page 27)

judge, A. B, you're not an attorney; and C, it's totally improper under the Rules of Professional Responsibility to threaten any witness with contempt of court.

MR. SALMINEN: That was no threat.

MR. FENA: You just told him he would be in contempt of court.

MR. SALMINEN: Isn't that in the Rules, Mr. Fena?

MR. PREBICH: No.

MR. FENA: I'm sorry, no.

THE WITNESS: I'll make this statement now so we can get this over with. I will answer no further questions until my attorney is in town.

Q. (By Mr. Salminen) Well, just a minute now. We still have the unanswered question, Mr. Dow. Did you tell Partner Spearman that the offer was \$950,000 contingent upon a short time signing from both of us, and being reduced to \$675,000 if it were going to take a relatively long time and have to go through the court system, which was in fact a dissolution of my marriage and whatever other things were hanging in the court system? Did you in fact make that offer with that contingency?

A. I stated no more than two minutes ago I would answer no further questions until my attorney is in town, and I meant it.

Q. Well, I'm going to ask the questions, because (end page 27)

(Note: Salminen then went to Judge Joseph R. Scherkenbach's chambers to compel Dow to answer questions. (Pg G-49,50)

(Deposition continues following meeting
in Judge Scherkenbach's chambers)

(page 36)

MR. PREBICH: It was.

Q. (By Mr. Salminen) Well, I'll ask you specifically then a specific question. Did you ever make contact in any manner, that would be orally or in writing, with any person who was in the employ in any manner of the First National Bank or First Bank of Minneapolis relative to your offer that you made to Mr. Spearman?

A. Again that's an area I cannot answer, and you're well aware of it.

Q. From what standpoint: That has nothing to do with the corporation. That's an offer. We talked to the judge and the judge says as long as I didn't specifically ask questions about Open Arms Corporation that you're to answer the question.

MR. PREBICH: Mike, the discretion to

answer was left to Mr. Dow, and if he felt he did not want to answer he did not have to answer. You can inquire of him in any further depositions when Mr. Stein is present. So he can answer any questions today he's willing to answer, and those that he's not willing will be dealt with at a later time. So you might as well proceed.

Q. (By Mr. Salminen) What is your answer?

A. I clarify that by stating that I would not answer that because that is leading into areas I'm not at liberty to talk about. (end page 36)

(page 37)

Q. Now, the areas that the judge talked about was anything - - any questions about Open Arms or its directors.

MR. PREBICH: You're harrassing this witness. You're wasting our time, you're causing these people to incur legal fees. You know he doesn't have to answer the

question if he chooses not to, so move to a new question.

MR. SALMINEN: He has to answer because the judge specified anything relative to Open Arms. I'm not asking anything about Open Arms. I'm asking about an offer of \$950,000 that Mr. Dow made to Mr. Spearman. And I'm asking if there was any specific person in the employ of the First Bank or First National Bank of which it's called of Minneapolis who was in contact with you relative to this purchase offer of \$950,000 you made to Mr. Spearman?

THE WITNESS: May I say something? Mr. Salminen is going into an area which I'm not able to discuss. If he proceeds in this area then he'll have to go back to the judge and get it clarified to him once more that I'm not allowed to talk in this area until my attorney is present.

MR. FREBICH: And you're the one person out of four that was in the room that

apparently does not understand what the judge said.

MR. SAIMINEN: I understand what the judge said.

MR. PREBICH: Then I guess all three of us are wrong? Is that what you're saying?
(end page 37)

(page 43)

or local, in regards to a proposed project that would utilize that old hospital building? Did you talk to anybody as far as -

A. In what time frame are you talking about?

Q. Any time frame - - since 1981, since SPAL Enterprise owned it?

A. '81 until March last year?

Q. Until the present?

A. If you're including the present I'll not answer the question. You're asking me to speculate on something that might be in the project, might not be in the project, things I can't answer.

Q. That has nothing to do with Open Arms.

MR. FENA: That's objected to as argumentative when he tells you he's not going to answer.

A. Nothing past May of last year has anything to do with what is happening here. Anything that has happened since May of last year, if I'm in the process of trying to raise funds to open a half-way house it does not include Old Hibbing General until legal matters are settled and it's free to be put on the market. It's tied up in legal business. I was advised by my attorney to stay the hell away from you guys until this kettle of worms are solved - - and please, ladies, excuse my French. I'm tired going over this. (Audrey Salminen and Sally Spearman were present at the deposition)

(end page 43)

still desire to go forward, we might consider it. But right now we're not even considering the building.

Q. Thank you.

Now you say you have no records. You say you have no records that I requested in the notice of taking deposition.

Where are those records?

A. There again you're asking me to go into areas that I'm not at liberty to answer without my attorney present.

Q. Well, you know, if we're talking about a four to five million dollar project certainly there must be some records. And I'm asking you where they are relative to this partnership property - -

MR. PREBICH: He told you he won't answer.

Q. (By Mr. Salminen) - - which is relative to this deposition? This is partnership property we're talking about. You have no records. And where are

those records?

MR. PREBICH: You're wasting more time.

A. I told you you're leading into an area that I cannot at liberty discuss unless my attorney is present.

Q. (By Mr. Salminen) Now, Mr. Dow, in regard to the SPAL Hall portion - - that's the portion that was purchased by the Merchants & Miners State Bank at the Sheriff's sale due to the foreclosure - - do you have any plans on purchasing that? And the relevance is that SPAL Enterprise partnership still has time on the redemption period I believe to redeem (end page 56)

(page 71)

say relative to your attorney's return and what was to take place so we can ask questions relative to Open Arms Corporation?

MR. FENA: Well, I don't think that's

proper for this witness to interpret what the judge's order was. The judge would know what that is.

MR. SALMINEN: Well, I'm asking him what the judge told him because it's relevant - -

MR. FENA: The judge told him, did he not, my recollection was to notify Mr. Stein when Mr. Stein got back about this. Do you remember that, Mike? Is that correct?

THE WITNESS: The judge told me to inform both the judge and Mr. Salminen upon the return of my lawyer. At that time if he wishes to ask questions he would have to resubpoena me.

MR. SALMINEN: And the name of the lawyer was Mr. Stein; is that correct?

THE WITNESS: Yes.

MR. SALMINEN: Manny Stein?

THE WITNESS: Yes.

(end page 71)

STATE OF MINNESOTA COUNTY COURT
COUNTY OF ST. LOUIS SIXTH JUD. DIST.

(PARTIAL)

Group Health Association of,
Northeastern Minnesota, Inc.

Plaintiff,

vs.

Stanley Dow,

Defendant

D E P O S I T I O N

(The following is the Deposition of
STANLEY A. DOW, taken pursuant to Notice
of Taking Deposition, at 330 South Third
Street, Virginia, Minnesota on June 30,
1986, commencing at approximately
10:00 a.m.)

APPEARANCES:

On Behalf of the Plaintiff:

David T. Stall
Attorney at Law
330 South 3rd Street
Virginia, Minnesota 55792

On Behalf of the Defendant:

Defendant appeared Pro-se

Exh C

G-37

not okay.

Q. Who told you it was not okay?

A. Who told me the building was not okay?

Q. Yes.

A. Well, I have a lawyer that was helping me put it together, a non-profit organization, and he did a little checking into it, and he found out that the building was in foreclosure on the east wing, which couldn't be sold until that was cleared up, and that there was a big kettle of worms where one partner was suing the other partner. The ownership on that building was just all tied up and everything and that there was no way that we could get a clear title to the building until these court actions were settled.

Q. I see. Who is your attorney?

A. Manuel Stein was the one, at that time, trying to put together a non-profit

organization.

Q. So you didn't deal directly with any of the principals of the partnership that owned the property?

A. I had talked to them to find out if the building was available and to look at the building, you know, to make sure it was feasible to what we wanted and still constructionally sound.

Q. Okay.

A. We come up with a figure that they would be happy (end page 16, begin 17) to sell it for and then shortly -- well, that was in March. By May or June, when the grants came through, the thing was so messed up in court with the foreclosure action going into it, and the partnerships and all of this stuff, that we just had to wipe our hands of it.

Q. Who were you dealing with, or who did you talk to? Which one of the

partners -- Spearman or Salminen?

A. I talked to Spearman first and then Salminen.

Q. Those were the only people you talked to in reference to the building?

A. Yes, sir. They were the only ones I knew owned it. I did not know that Merchants & Miners Bank, at that time, was in foreclosure on the Spal Hall part of it.

Q. Okay. You didn't know that?

A. No, I did not.

Q. And you didn't deal or talk with anyone at Merchants & Miners?

A. No, I did not.

Q. You don't bank there?

A. No. I used to have a savings account there, but that's been long closed.

Q. And you learned of the foreclosure proceedings from Mr. Stein?

A. He's one of them that found them, yes, sir.

Q. And after you learned of the foreclosure (end page 17, begin 18) proceedings, you didn't talk to the bank, did you?

A. No. I never approached the bank at all.

Q. The banks have never approached you, have they?

A. No. It was just such a messed up kettle of worms there that under advisement from him -- we weren't even going to get involved with it, you know, until it got cleared up. Because you had Salminen's wife suing him for part of the building, he was suing his partner for dissolution of partnership, and then they were countersueing. Then all of a sudden, the bank is entered in here somehow with the foreclosure. It was just so messed up that there was no way that we could get clear title or clear deed to the building or the property.

Q. To your knowledge, your attorney didn't contact the bank, did he?

A. No. As far as I know, he did not. I can't say anything other than what I know. He found, by talking to Mr. Spearman and Mr. Salminen, he contacted them asking to see a copy of the abstract and deed on the property, and at that time, they informed him of the foreclosure action going against the building, and that there was other legal problems that -- well, basically, one said they wouldn't sell until the court action got settled.

Q. Who said that?

A. Salminen. (end page 18)

(page 19)

Q. Salminen said that he would not consider --

A. He would not consider the sale.

Q. Until when?

A. All legal problems that were involved in that building were settled.

Q. That includes the partnership?

A. That included the partnership and his divorce settlement.

Q. So he wasn't going to sell until his divorce settlement was done?

A. Uh-hum, yes. As far as I know. That's what I was told. That's hearsay on my part.

Q. That's what your attorney told you?

A. Yes.

Q. And that was based on his investigating and talking to Salminen?

A. Evidently, yes, sir.

Q. And you would assume that your attorney was telling you accurately whatever transpired?

A. I would hope so. Mr. Stein was donating his services to us, you know, trying to get this non-profit corporation group going, because what we need is a good halfway house up here on the Range that deals with both alcohol and

chemically dependent and taking both men
and women in. That's what we are looking
at, because that hospital . . (end page 19)

April 9, 1988

Honorable Joseph R. Scherkenbach
District Court Judge
St. Louis County Courthouse
Hibbing, Minnesota 55746

Re: In Re the Petition of Richard F.
Spearman, Petitioner, for Dissolution
of Partnership of: Spal Enterprise,
a Minnesota Partnership
Court file 85-0064HC

Dear Judge Scherkenbach:

It is unconscionable and unreasonable that the Minnesota Court system, including the Appellate Courts, have snatched seven precious years from the financial life of this formerly productive person, and left him destitute.

Your honor, I was not put on this earth to subsidize fraudulent Bankers, partner, co-shareholder or ex-wife and others.

In the instant matter, you have obstructed justice when you repeatedly denied my quests for discovery in regard to witness Stanley A. Dow. (see copy letter to you dated 3/12/86 attached)(copy of Dow depo transcripts on file dated 1/14/88 & 3/11/86) Mr. Dow was subpoenaed to testify at the 3/25/88 hearing before you. Dow failed to show, and you told my attorney, Don Paquette, that a court order was needed to have Dow appear. Dow should have been held in contempt of court and sentenced to jail - that is what you did to me in regard to the discovery process.

You again obstructed justice when you conducted hearings in a companion legal

Exh D

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action titled Merchants and Miners State Bank vs. Spal Enterprise, et al, court file C84-0558. You issued an Order for Dismissal of Garnishee, Arrowhead Ventures, Inc., without a motion from the Merchants and Miners State Bank requesting same. The result of that Order was to permit attorney David Naughtin to refuse to have his client respond to my Request For Production of Documents. His client is Catherine Joyce Cody, Secretary for Arrowhead Ventures, Inc., party to that action. Naughtin said there was no legal action pending after you had issued your Order for dismissal. In those hearings, you threatened this party to that legal action when you sentenced me to jail in Duluth, saying I was in contempt of court in regard to the taking of discovery from me.

You have been ramming a dissolution of partnership down my throat in an overwhelmingly prejudicial and discriminate manner. A conspiracy is using the District Courts of the Honorable Mitchell A. Dubow, Joseph R. Scherkenbach and Chief District Judge David Ackerson as vehicles to financially destroy this Minnesota partner. This partner has been cheated out of a \$950,000,00 prospective sale of partnership real estate. The million dollar rip-off will not be swept under the rug.

The records and papers on file in court files 85-0064HC and C84-0558 show that the decisions rendered were consistently and overwhelmingly prejudicial in favor of the Merchants and Miners State Bank of Hibbing, Richard F. Spearman, Audrey Lorraine Salminen and Catherine Joyce Cody/ Arrowhead Ventures, Inc.

This citizen of the State of Minnesota and the United States of America has been denied due process in the courts of Judges Dubow and Scherkenbach. Your honor, in the interest of justice being served, I sincerely believe that you should remove yourself from this legal action at this time.

I have instructed my attorney, Mr. Paquette, to move the court for leave to bring a claim against the Merchants and Miners State Bank of Hibbing in the instant matter. Such claim alleges fraud and must be heard before a jury, in conjunction with the claim on file against Audrey Lorraine Salminen for her part in the conspiracy that has perpetrated a massive fraudulent scheme upon me.

As one who is interested in reason and justice, I am,

Sincerely,

Michael A. Salminen
P.O. Box 353
Hibbing, Minnesota 55746
(218) 263-6477

cc Honorable Mitchell A. Dubow
Honorable Chief District Judge David Ackerson
Minnesota Board on Judicial Standards
Donald Paquette, attorney for Michael A. Salminen
Jack Fena, attorney for Audrey Lorraine Salminen
Richard E. Prebich, attorney for Richard F. Spearman
David T. Stall, attorney for Merchants and Miners State Bank

David Naughtin, attorney for Catherine Joyce Cody

Molly Weatherill, Hibbing Daily Tribune

David Racer, Minnesota 180⁰, Inc.

John Schadt, KDLH TV Channel 3

John Lindsay, WCCO TV Channel 4

March 12, 1986

Honorable Joseph R. Scherkenbach
District Court Judge
St. Louis County Courthouse
Hibbing, Minnesota 55746

Re: Spearman Petition for Dissolution of
Spal Enterprise, et al, Court file
85-0064HC

Dear Judge Scherkenbach:

This letter is in regard to the Deposition that I took of Stanley A. Dow, yesterday, at the St. Louis County Courthouse in Hibbing. The Notice of Taking Deposition clearly outlined the materials and subject matter upon which the questioning would be based. After answering some questions, Mr. Dow then stated that he refused to answer further questions without his legal counsel being present. Mr. Dow did not advise me prior to the hearing that his legal counsel, Mr. Manuel H. Stein, would not be able to attend the hearing. Mr. Stein did not advise me that he would be unable to attend the hearing to represent Mr. Dow.

When Mr. Dow refused to answer my questions, I went to your chambers, along with Mr. Fena, Mr. Prebich and Mr. Dow, to seek your guidance. A brief discussion followed, and you asked Mr. Dow a question about Open Arms Corporation. Mr. Dow stated to you that Open Arms Corporation is not registered in the State of Minnesota. Mr. Dow then told you that his attorney advised him to not answer questions relative to the make up of Open Arms Corporation or its directors.

You then told Mr. Dow to continue with the Deposition and that he would not have to answer questions specific to the make up of Open Arms Corporation, but would be required to answer other questions submitted to him by Mr. Salminen.

If I heard you correctly, you then instructed Mr. Dow to advise the Court and Mr. Salminen when his attorney in the matter, Mr. Stein, has returned to Hibbing to represent him, so that a hearing can be scheduled to complete the Deposition of Mr. Dow.

If you consider any of the statements in the second and third paragraphs to be incorrect, please advise me in writing of same at your earliest convenience.

Respectfully,

Michael A. Salminen
1920 10th Avenue East
Hibbing, Minnesota 55746

cc Jack Fena; Richard E. Prebich;
Stanley A. Dow; Manuel Stein

Telephones
Office AM 2-2692
Residence AM 2-2037

Stein & Stein
Attorneys and Counselors

Manuel H. Stein
Lloyd W. Stein (Dec'd)

Hibbing, Minnesota

July 16, 1986

Mr. Mike Salminen,
Hibbing, Minnesota 55746

Dear Sir:

Your request from this office to advise you whether or not one Stan Dow had retained our offices to represent him in any matter in which you were involved.

As we advised you previously Mr. Dow did call us while we were in Florida and sought advice which we gave him.

No, we have not been retained by him to this day in any matter in which you are involved with him.

Yours very truly,

OF STEIN & STEIN

MHS*S

Exh E

G-51

STATE OF MINNESOTA DIST. COURT-CIV DIV
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT

Michael A. Salminen,

Plaintiff,

vs.

Martha Terry, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and First Bank
National Association of
Duluth, d/b/a First Bank
Duluth, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

10
NOTICE OF
MOTION AND
MOTION
Court file
88-10364

TO: MARTHA TERRY and FIRST BANK DULUTH,
Defendants, and STEVEN W. SCHNEIDER,
their attorney.

Please take notice that on the 18th
day of May, 1989, at 8:30 a.m., or as
soon thereafter as counsel can be heard,
at the St. Louis County Courthouse, Hib-
bing, Minnesota, undersigned will move the
above-named Court for an Order granting
consolidation of trials in regard

Exh F

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District Court legal actions C84-0558, 85-0064HC, 88-11246 and the instant matter, 88-10364. This motion is made pursuant to all of the files, records, transcripts of depositions and proceedings herein, including Memorandum of Law attached hereto. Pursuant to Sixth Judicial District Special Term Rule 2.1, Respondent is advised that his responsive brief, if any, must be served and filed at least two full days before said motion is heard. Dated May 9, 1989.

MICHAEL A. SAIMINEN
P.O. Box 353
Hibbing, Minnesota
(218) 263-6477

STATE OF MINNESOTA DIST. COURT CIV DIV
COUNTY OF ST. LOUIS SIXTH JUD. DISTRICT

Michael A. Salminen,
Plaintiff,

vs.

10
MEMORANDUM
OF LAW
Court file
88-10364

Martha Terry, as Special
Administratrix of the Es-
tate of Emanuel H. Stein,
Deceased; and First Bank
National Association of
Duluth, d/b/a First Bank
Duluth, as Personal Repre-
sentative of the Estate of
Emanuel H. Stein, Deceased,

Defendants.

Common questions of law or fact rel-
ative to Spal Enterprise partnership prop-
erty are involved in this instant legal
action, and in District Court legal ac-
tions C84-0558, 85-0064HC and 88-11246,
all pending in the above-named Court.
Undersigned has been wrongly denied his
right to have the issues of fact tried by
a jury in the above actions. Plaintiff

has preserved his right in the instant matter, pursuant to Rule 38.01, Minnesota Rules of Civil Procedure. Plaintiff requests a "Consolidation of Trials".

Rule 42.01 Consolidation

The "consolidation of actions" brings about a merger of two or more actions into one, whereby each loses its separate identity; whereas in case of "consolidation of trials" there is no loss of identity of an action. (Chellico v Martire (1948) 34 N.W. 2d 155)

Consolidation of Trials

Where the interests of justice so require, separate judicial proceedings may be integrated so as to afford the parties the relief to which the law entitles them. (State ex rel. Spurck v Civil Service Bd., (1948) 32 N.W. 2d 574)

Undersigned has been overwhelmingly prejudiced by consistently outrageous decisions rendered by the Honorable Judges Mitchell A. Dubow, Joseph R. Scherkenbach and David S. Buoschor in the above-referenced legal actions. Judges Dubow and Scherkenbach have repeatedly thwarted Salminen's right to make discovery in legal actions

084-0558, 85-0064HC, 88-11246 and 88-10364, the instant matter.

Inspection of all of the files, records transcripts of depositions and proceedings in all of the above-referenced matters demonstrates in "clear, unequivocal and convincing" manner that there is fraud by the court and fraud upon the court. Under law of the United States, undersigned has been deprived of his property without due process. (14th Amend. U.S. Const;)(St. Louis I.M. & S.R. Co. v Taylor (1908) 28 S Ct 616)(Philip Wagner, Inc. v Leser (1915) 36 S Ct 66)(Buchanan v Warley (1917) 38 S Ct 16)(Ferry v Sinderman (1972) 92 S Ct 2694)(Lott v Haley (1979) La 370 So 2d 521)(Burrows v Keene (1981) 432 A 2d 15) (Crumpton v Mitchell (1981) 281 SE 2d 574) (State ex rel. Spurck v Civil Service Board et al 32 N.W. 2d 574)

It is a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as

preventing the opposing party from fairly presenting his case or defense. (Pfizer, Inc. v International Rectifier Corp. (8th Cir. 1976) 538 F 2d 180,195)

JUSTICE MUST BE SERVED! It is imperative that the trial court grant to undersigned an Order on his motion to "Consolidate the Trials" of legal actions C84-0558, 85-0064HC, 88-11246 and the instant matter, 88-10364, in forthright manner.

Dated this 9th day of May, 1989.

MICHAEL A. SALMINEN
P.O. Box 353
Hibbing, Minnesota 55746
(218) 263-6477



MAY 1 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1547

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

MICHAEL A. SALMINEN,

Petitioner,

vs.

MARTHA TERRY, as Special Administratrix
of the Estate of Emanuel H. Stein, Deceased;
and First Bank National Association
of Duluth, as Personal Representative
of the Estate of Emanuel H. Stein, Deceased,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

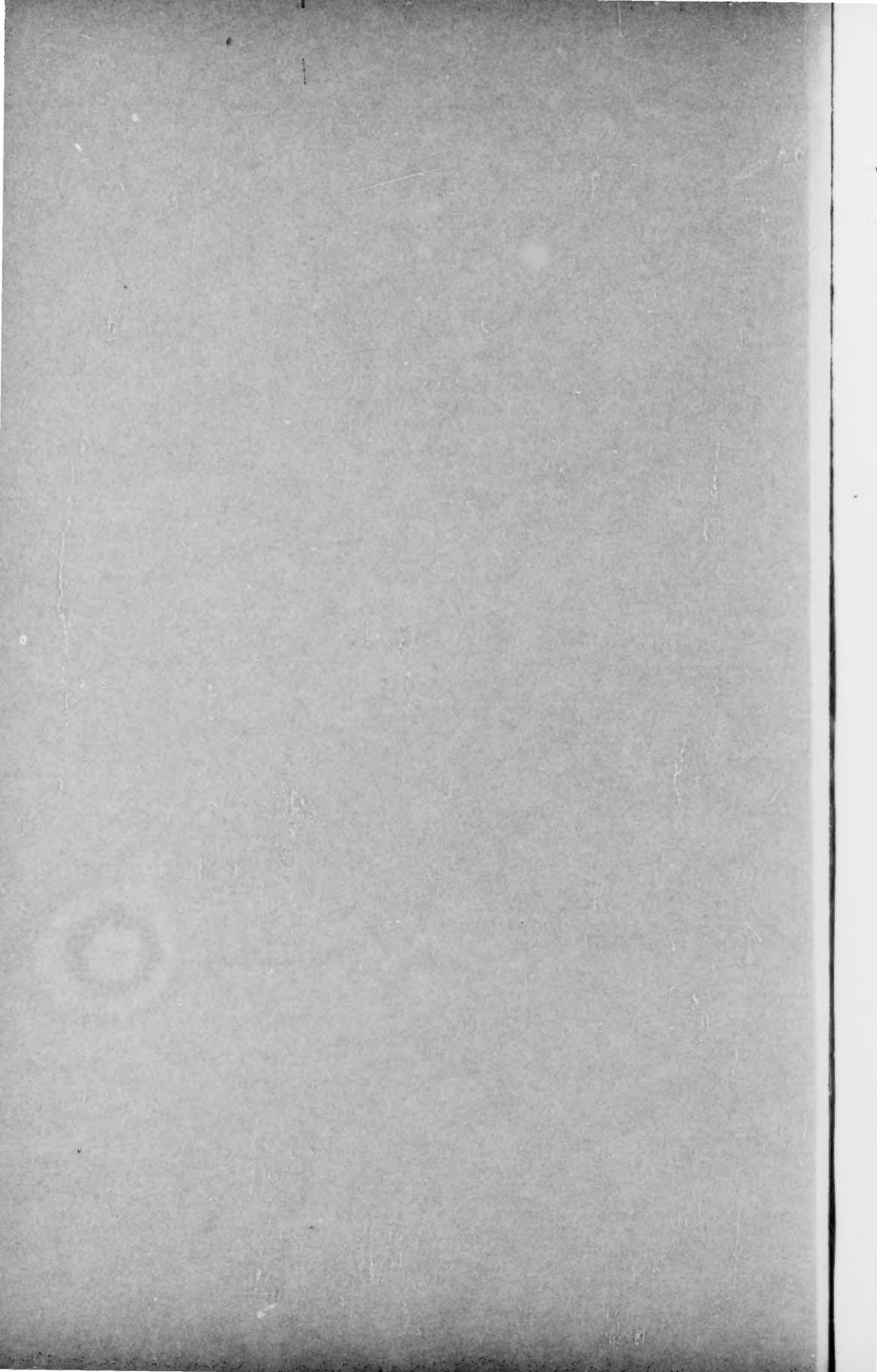
BRIEF FOR RESPONDENT IN OPPOSITION

Of Counsel:

STEVEN L. REYELTS*
STEVEN W. SCHNEIDER
HALVERSON, WATERS,
BYE, DOWNS, REYELTS
& BATEMAN, LTD.

700 Providence Building
Duluth, Minnesota 55802
(218) 727-6833

*Counsel of Record



QUESTION PRESENTED

The question presented by the Petition for Writ of Certiorari herein is as follows:

Whether the grant of summary judgment in favor of Respondent by the Court below, Petitioner's failure to timely appeal therefrom and the subsequent refusal of the Minnesota Supreme Court to review the dismissal of Petitioner's Appeal constitutes a deprivation of Petitioner's property without due process of law under United States Constitution, 14th Amendment, §1 and 42 United States Code §1983.



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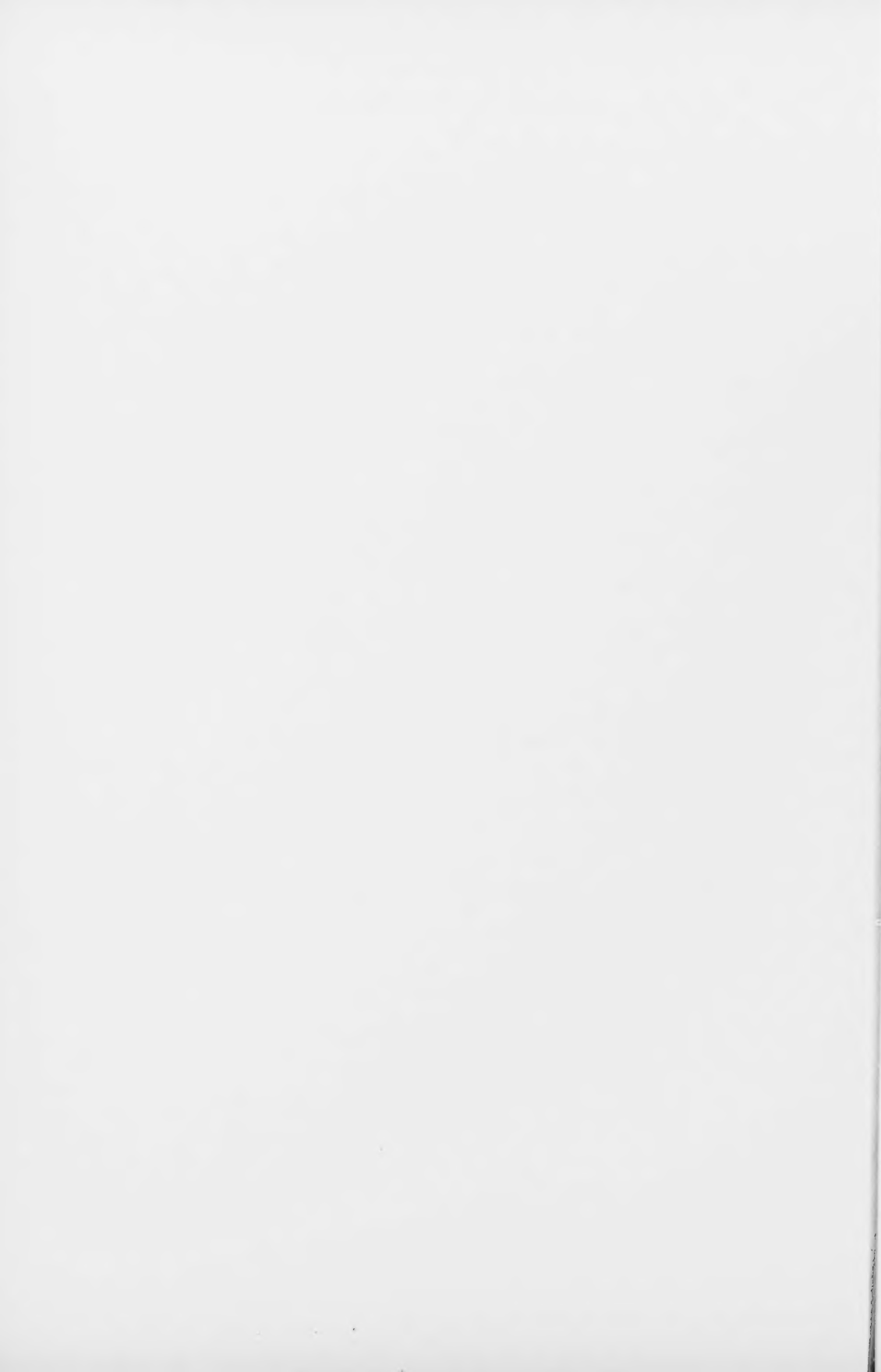


TABLE OF AUTHORITIES

Cases:

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<u>Strum v. Schrank,</u> 43 B.R. 755 (D.C.N.Y. 1984)	9
<u>United Steelworkers of America v.</u> <u>Phelps Dodge Corp.,</u> 833 F.2d 804 (9th Cir. 1987)	9
<u>West v. Atkins,</u> _____ U.S. _____, 108 S.Ct. 2250, 101 L.Ed.2d. 40 (1988)	9

IN THE
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MICHAEL A. SALMINEN,

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vs.

MARTHA TERRY, as Special Administratrix
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of Duluth, as Personal Representative
of the Estate of Emanuel H. Stein, Deceased,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY
PROVISIONS

United States Constitution, Amendment 14,
Section 1:

No State shall...deprive any person...prop-
erty, without due process of law...

42 United States Code, Section 1983:

Every person who, under color, any statute, ordinance, regulation, custom or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights...secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress.

THE DECISIONS BELOW

Petitioner commenced this action by service of a Summons and Complaint dated April 15, 1988 (Pet. App. A). Petitioner alleged that he had been financially harmed by a conspiracy of persons to conceal prospective business opportunities from Petitioner. Petitioner alleged participation in the conspiracy and fraud by Respondent Emanuel H. Stein (now deceased), an attorney who represented a prospective purchaser of Petitioner's property.

Subsequently, Petitioner brought a Motion to Amend his Complaint to allege punitive damages against Respondents. That Motion was denied. Respondents filed a Motion for Summary Judgment on all claims asserted by Petitioner. On June 1, 1989, the Honorable Joseph R. Scherkenbach entered his Order granting Respondents' Motion in entering judgment on all aspects of Petitioner's claims. (Pet. App. E and F).

On September 8, 1989, more than 90 days after entry of judgment (the appeal period specified in Minn. R. Civ. App. Pro. 104.01), Petitioner moved for relief from the judgment and for a new trial. That Motion was denied by Order dated September 26, 1989 (Pet. App. C).

Petitioner appealed to the Minnesota Court of Appeals from the Order denying his Motion to vacate the Judgment. Observing that the grounds alleged in the Motion to vacate were reviewable by an Appeal from the Judgment, the Minnesota Court of Appeals dismissed Petitioner's Appeal (Pet. App. A). Upon a Petition for Discretionary Review under Minn. R. Civ. App. Proc. 117, the Minnesota Supreme Court denied further review.

ARGUMENT

I. THE DECISIONS BELOW PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS.

The basis of Respondents' Motion for Summary Judgment and the decision of the Court below was that the Petitioner had not presented any probative evidence to support his claims of conspiracy and fraud. Respondents' Motion and the decision of the Court below were based upon Minnesota Rule of Civil Procedure 56.02, which is identical in all material respects to Rule 56(c) of the Federal Rules of Civil Procedure.

At the Summary Judgment hearing, Respondents demonstrated a complete failure of proof on the part of Petitioner concerning essential elements of his claims. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court below made a determination that the proof offered by Petitioner did not demonstrate a

genuine need for trial. Masushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Because the decision of the Court below represents an appropriate grant of summary judgment to Respondent and, further, because Petitioner failed to take appropriate steps to secure timely reviews of that decision, the Petition should be denied.

**II. THE DECISIONS BELOW DID NOT
DECIDE A QUESTION OF FEDERAL
LAW.**

Petitioner erroneously contends that the decisions below involve considerations of deprivation of due process under U.S. Constitution, Amendment 14, §1 and violations of 42 U.S.C. §1983. (Pet. at 2-3). The decisions below rested entirely on the claims presented in Petitioner's Summons and Complaint; only the allegations of fraud and conspiracy were addressed. Petitioner never asserted any claims that Respondents had deprived him of due process

nor that there had been any violation of Petitioner's rights under color of state law by the Respondents. The language quoted by Petitioner is contained in various documents filed with the Court below, but have never been raised as a direct claim against Respondents. Indeed, Petitioner's complaints of due process violations originated two years prior to the commencement of this action and do not directly name Respondents as culpable actors.

Since no federal question was raised in the Court below, the Petition should be denied.

**III. THE DECISIONS BELOW DO NOT DECIDE
A QUESTION OF FEDERAL LAW IN A
A WAY IN WHICH CONFLICTS WITH
APPLICABLE DECISIONS OF THIS
COURT.**

As stated above, Petitioner did not properly plead or raise issues of deprivation of due process under U.S. Constitution, Amendment 14, §1 or 42 U.S.C. §1983 in the Court below. Even if Petitioner's Complaint is given its most expansive reading, however, the decision below

does not address questions of federal law in a way which conflicts with applicable decisions of this Court.

Petitioner presented no evidence that Respondents engaged in any "state action" under U.S. Constitution, Amendment 14, §1. At most, Petitioner alleges Respondents utilized the Minnesota State Court process to secure a determination of rights and obligations. One who merely avails himself of the applicable state court legal process is not engaged in "state action" for the purpose of U.S. Constitution, Amendment 14, §1. Cobb v. Georgia Power Co., 757 F.2d 1248 (11th Cir. 1985). Lacking even so much as a bare allegation of state action, there is no basis for Petitioner's claim.

Likewise, Petitioner presented no evidence of an alleged violation of his rights secured by the Constitution nor that Respondents acted

under color of state law to secure such a deprivation; both essential elements of Petitioner's cause of action under 42 U.S.C. §1983. West v. Atkins _____ U.S. _____, 108 S.Ct. 2250, 101 L.Ed.2d. 40 (1988). No showing is made that Respondent Emanuel H. Stein, a private person, conspired with state officials to deprive Petitioner of his constitutional rights. United Steelworkers v. Phelps Dodge Corp., 833 F.2d 804 (9th Cir. 1987). Finally, even if Respondents' decedent had acted as Petitioner suggests, he was acting as a private attorney in his professional capacity. Such actions by private attorney are not considered actions under color of state law. Sturm v. Shrank, 43 B.R. 755 (D.C.N.Y. 1984).

The decision below, even if it addressed questions of federal law, was in accord with the interpretation of U.S. Constitution, Amendment 14, §1 and 42 U.S.C. §1983 by this Court and other Federal Courts. The Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated May 2, 1990.

Respectfully submitted,

STEVEN L. REYELTS*
STEVEN W. SCHNEIDER
HALVERSON, WATTERS, BYE,
DOWNS, REYELTS & BATEMAN
700 Providence Building
Duluth, Minnesota 55802
(218) 727-6833

*Counsel of Record

